



COMMONWEALTH OF KENTUCKY
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OAG 17-010

April 28, 2017

Subject: Whether the Lincoln County Ambulance Board substantially complied with the notice provisions in levying a tax exceeding the compensating tax rate and may distribute the revenue from that tax, where the second notice was published five days before the public hearing instead of the required seven days

Requested by: Neil Tucker, Counsel
Lincoln County Ambulance Board

Written by: Matt James

Syllabus: The Lincoln County Ambulance Board substantially complied with the notice provisions in levying a tax rate exceeding the compensating tax rate, where the second notice was published five days before the public hearing instead of the required seven days, and is not prohibited from distributing the revenue from the tax on those grounds.

Statutes construed: KRS 132.017; KRS 132.023

Opinion of the Attorney General

Neil Tucker, counsel for the Lincoln County Ambulance Board, requests an opinion of this office on whether a tax levied in excess of the compensating tax rate complies with the notice provisions required by KRS 132.023, where the second notice was published five days before the public hearing instead of the required seven days. We advise that the Ambulance Board substantially complied with the requirements of KRS 132.023, even though the second notice was published five days before the public hearing instead of the required seven days,

and the Ambulance Board is not prohibited from distributing the revenue from the tax on those grounds.

Based on the facts as presented to us by Mr. Tucker, on July 25, 2016, the Ambulance Board voted to increase its tax rate by more than the compensating tax rate, triggering the public notice and hearing requirements of KRS 132.023. To comply with KRS 132.023, the Ambulance Board published notices in the Interior Journal, the only newspaper in Lincoln County, on July 28 and August 4, 2016. However, the date of the public hearing was set for August 9, 2016. KRS 132.023(2)(b)(6) requires "a time and place for the public hearing which shall be held not less than seven (7) days, nor more than ten (10) days, after the day that the second advertisement is published." The Ambulance Board thus did not strictly comply with KRS 132.023(2)(b). Twenty-three people showed up for the hearing. On August 11, 2016, the Ambulance Board voted to increase the tax.

KRS 132.023(3)(a) provides that the "portion of a tax rate levied by an action of a special purpose governmental entity which will produce revenue from real property . . . more than four percent (4%) over the amount of revenue produced by the compensating tax rate shall be subject to a recall vote . . . as provided for in KRS 132.017." KRS 132.017(2)(a) provides that the "portion of a tax rate . . . subject to recall . . . shall go into effect forty-five (45) days after its passage." KRS 132.017(2)(b) provides that "during the forty-five (45) days next following the passage of the ordinance . . . , any five (5) qualified voters who reside in the area where the tax levy will be imposed may commence petition proceedings to protest the passage of the ordinance." On September, 15, 2016, a recall petition was initiated. KRS 132.017(2)(c) requires that in order to be effective, "the petition shall be signed by a number of registered and qualified voters residing in the affected jurisdiction equal to at least ten percent (10%) of the total number of votes cast in the last preceding presidential election." The recall period expired on September 26, 2016 without obtaining the requisite number of signatures.¹ The tax subsequently went into effect. At issue is whether the tax is avoidable due to the failure to strictly comply with KRS 132.023(2)(b).

¹ There appears to be a question as to whether the Ambulance Board violated KRS 132.017(3)(a), which requires that if an election on the tax is necessary, it shall be placed on the ballot at the next regular election. However, an election is only necessary if the petition is found to be sufficient under KRS 132.017(2)(f), and KRS 132.017(2)(c) requires that the petition must be signed by ten percent of the voters in the area in the last presidential election. If the petition is not sufficient, no

"Traditionally, our analysis of election law violations and their effects upon election results requires us to determine if the statutory requirement under review is directory or mandatory. Violations of directory requirements do not nullify the elections results, but violations of mandatory provisions may." *Hardin v. Montgomery*, 495 S.W.3d 686, 699 (Ky. 2016). "Courts will apply substantial compliance when a statutory provision is directory rather than mandatory. This determination is crucial because '[a] proceeding not following a mandatory provision of a statute is rendered illegal and void, while an omission to observe or failure to conform to a directory provision is not.'" *Petition Comm. by & Through a Majority of its Members v. Bd. of Educ. of Johnson Cnty., Ky.*, 509 S.W.3d 58, 64-65 (Ky. Ct. App. 2016) (citations omitted). "If the directions given by the statute to accomplish a given end are violated, but the given end is in fact accomplished, without affecting the real merits of the case, then the statute is to be regarded as directory merely." *Knox Cty. v. Hammons*, 129 S.W.3d 839, 843 (Ky. 2004).

In *Hall v. Sturgill*, 204 S.W.2d 496 (Ky. 1947), the court addressed a situation where notices of a local option election required at the time by KRS 242.040 were posted on September 17, where "September 16th was the last day for the posting of these notices." *Id.* at 496. The court held that "KRS 242.040 is mandatory as to the publication and posting of the notices of an election, but that the provision concerning the time of such posting and publication is directory only, and that a substantial compliance therewith is sufficient." *Id.* at 499.2 Applying the reasoning of *Hall*, we advise that the publication of notices of an election is mandatory, but that provisions concerning the time of publication are directory, and that substantial compliance with them is sufficient.

In this case, the second advertisement was placed in the newspaper five days before the scheduled public hearing, instead of the seven days required by KRS 132.023(2)(b)(6). Although the Ambulance Board did not strictly comply with KRS 132.023(2)(b)(6), the mandatory notices were published, and twenty-three people showed up at the hearing, indicating that the public was generally

election is necessary. KRS 132.017(2)(g). In this case, the required ten percent of the voters was not met, and the petition was not sufficient for a recall vote.

² See also *Chumley v. Williams*, 639 S.W.2d 557, 560 (Ky. Ct. App. 1982); *McDonald v. Whallen*, 415 S.W.2d 840, 842 (Ky. 1967); *Queenan v. City of Louisville*, 233 S.W.2d 1010, 1013 (Ky. 1950) (discussing *Hall* with approval).

aware of the proposed tax increase. Under these circumstances, we advise that the Ambulance Board substantially complied with the provisions of KRS 132.023(2)(b)(6), and the tax is not voidable on those grounds. The Ambulance Board's failure to strictly comply with KRS 132.023(2)(b)(6) does not prohibit it from distributing the revenue collected from the tax.

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A handwritten signature in cursive script, appearing to read "Matt James".

Matt James
Assistant Attorney General